IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1499

PHILLIP MILESTONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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April 2, 1979

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PHILLIP MILESTONE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Phillip Milestone, respectfully prays that a Writ of Certiorari be issued to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 25, 1979, and the Order Denying the Petition for Rehearing entered by that Court on March 2, 1979.

OPINIONS BELOW.

The Judgment Order of the Court of Appeals, and the Order denying the Petition for Rehearing, not yet reported, both appear in the Appendix hereto (App., pp. A3-A5).

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on January 25, 1979. The Order denying the Petition for Rehearing was entered on March 2, 1979. This Petition was filed within 30 days of the latter date. The Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Did the Court err in holding the trial court did not abuse its discretion pursuant to Federal Rules of Evidence, Rule 403, to exclude Milestone's prior conviction for tax evasion?

Did the Court err in holding the trial court could allow the tape recording to go out with the jury during its deliberations?

STATUTE INVOLVED.

18 U. S. C § 201.

STATEMENT OF THE CASE.

This Writ arises from the judgment order of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court of the Eastern District of Pennsylvania in favor of the Respondent and against the Petitioner (Docket No. 77-502); and from the subsequent Order entered denying the Petition for Rehearing.

Petitioner was tried before the District Court and a jury upon an indictment charging Bribery of a Public Official, 18 U. S. C. § 201(b)(1) and Aiding and Abetting 18 U. S. C. § 2 in Counts One, Two and Three and Conspiring 18 U. S. C. § 371 in Count Four.

The trial resulted in the conviction of Petitioner on Count Three for Bribery of a Public Official, and he was acquitted on Counts One, Two and Four.

Petitioner appealed to the United States Court of Appeals for the Third Circuit, inter alia, that the trial court erred in ruling that Petitioner's prior conviction in 1971 for tax evasion would be admissible in the case before it for Bribery of an Internal Revenue Agent and in allowing the tape recording between Internal Revenue Officer Small and Petitioner to go into the jury room during its deliberations.

The Court, in its judgment order, held the judgment of the District Court would be affirmed.

Subsequently, Petitioner filed a Petition for Rehearing with the Court on its Judgment Order alleging that the Court overlooked certain points of law and facts upon which it must have placed substantial reliance in its Order regarding Count III and in light of this, the Court's analysis and application of Federal Rules of Evidence, Rule 403 was improper and incorrect. The Court denied the Petition for Rehearing (App., p. A5).

It is from these rulings that this Petition ensues.

ARGUMENT.

I. The Trial Court Erred in Ruling That Petitioner's Prior Conviction in 1971 for Tax Evasion Would Be Admissible in the Case Before It for Bribery of an Internal Revenue Officer.

During the years 1971 through 1975 Petitioner experienced difficulties with paying his tax obligations to the Internal Revenue Service. Petitioner was charged with Bribery of a Public Official, Aiding and Abetting and Conspiring to Bribe a Public Official. He was acquitted by the jury of the alleged scheme to bribe the Internal Revenue officer who was assigned to collect his delinquent tax liabilities for years prior to 1974 and 1975 and of any participation in an alleged conspiracy to bribe the Internal Revenue agent who conducted the audit examination for the years 1974 and 1975. The evidence showed and the jury agreed by its verdict that Petitioner's only bribe involved $200 given by him after the audit and collection matters were completed. However, the Government attempted to have Petitioner's prior conviction for tax evasion admitted at the trial for alleged Bribery of an Internal Revenue Officer. Prior to trial, during trial and after the trial, defense counsel objected to the admissibility of the prior conviction on the grounds that it would be highly prejudicial and inflammatory and that its probative value would be outweighed by its prejudicial effect on the jury (N. T. 19-21, 22, 514-516).

The trial court ruled Petitioner could be cross-examined regarding the prior conviction for tax evasion if he took the stand and testified. The court reasoned the prior crime and the current charge were not similar even though a substantial part of the Government's evidence included testimony of unpaid and uncollected tax liabilities plus significant testimony that large amounts of taxes would be due from the current audit examination (N. T. 516-517). Hence, in light of this ruling, Petitioner did not testify and was unable to explain his version of the events surrounding the charge in Count III of the indictment. However, as shown by the evidence produced at trial, particularly statements and comments by the Government, Internal Revenue Agent and the Internal Revenue Officer, strong emphasis was put on the amounts of prior and future tax liabilities which related to this bribe (N. T. 56, 59, 65, 68, 72, 76-77, 158-159, 165, 172-173). The Government clearly indicated Petitioner owed the Government a substantial amount of tax. This permeated the entire trial and reinforced the similarity of crimes between Bribery of an Internal Revenue Agent and Officer and tax evasion (the prior conviction). In view of the emphasis on past and future tax liabilities, the current charge and the past conviction were sufficiently closely related as to prejudice the jurors minds.

As raised in the court below, it was crucial to the determination of this issue to identify exactly what grounds the trial court based its ruling on regarding Mr. Milestone's prior conviction. The trial court indicated, during the pretrial conference, its uncertainty concerning the test to be applied regarding this prior conviction when it stated, immediately prior to stating it was *crimen falsi,* "There is a general rule that if prejudice outweighs the probative value then you can still rule it inadmissible." (N. T. 20). Moreover, the trial court never expressly ruled that the prior conviction was *crimen falsi* but, rather it seemed to rest its decision on both Rule 609(a)(1) and (a)(2). (N. T. 516-517). Thus, Petitioner contended that the crime of income tax evasion did not clearly fall within that category of crimes involving dishonesty and false statement as expressly provided in Rule 609(a)(2) and therefore was not

admissible under Rule 609(a)(2). Indeed, where the formal title of an offense leaves room for doubt, automatic admissibility under Rule 609(a)(2) will normally not be permitted unless the prosecutor first demonstrates to the court, outside the jury's hearing, that a particular prior conviction rested on facts warranting the dishonesty or false statement description. This placed the burden of proof on the Government to show the prior crime fit within the ruling. The Government never presented any evidence on this point and only made the one sentence statement that the "offense of tax evasion involved both dishonesty and false statement" (Appellee's Brief, p. 3).

However, even if the Court ruled that tax evasion was a crime of *crimen falsi,* Petitioner submitted that the trial court again erred in not applying Rule 403 of the Federal Rules of Evidence which allows the trial court to exclude evidence which unduly prejudices the defendant as in the case at bar where the prior conviction for tax evasion was so similar to the present conviction of Bribery of an Internal Revenue Officer. The Petitioner cited many cases in support of this proposition wherein it was held that the prior conviction was inadmissible. The trial court noted in the case at bar (N. T. 21-22) and defense counsel stressed (N. T. 22) there was extreme prejudice because Petitioner was effectively precluded from testifying. This was a case where the *only other person* who could testify to the facts of the alleged bribe beside the IRS officer was the defendant himself. Compounding this was the fact that Revenue Officer Small explained what the tape "meant" at intervals when the recording was stopped at various times during his direct testimony (N. T. 258-300). Petitioner concluded that the similarity of the two crimes and the fact that the only other person who could testify to the transaction in question was Mr. Milestone mandated

that the trial court abused its discretion under Rule 403 in allowing the prior crime to be used in cross-examination.

Apparently, the Third Circuit Court in its judgment order overlooked and did not decide the following facts:

a. that the trial court did not specifically rule that the crime of tax evasion involved dishonesty or false statement; and

b. that the Government never established the crime of tax evasion was not a crime of dishonesty or false statement within the meaning of Rule 609(a).

Furthermore, in light of these factors and as set forth in Petitioner's brief and reply brief filed in the Third Circuit, after answering the above issues, that Court should have applied Federal Rule of Evidence Rule 403 to the case at bar and held the trial court abused its discretion under Rule 403 to exclude the prior conviction on the grounds of extreme prejudice.

Petitioner strenuously maintains that this Court should review the decision of the Third Circuit Court since this issue has never been decided by this Court. Specifically, the effect of Rule 403, Federal Rules of Evidence or Rule 609(a), Federal Rules of Evidence, is an open question among the Circuits and rises to such a magnitude that it is imperative that this Court resolve it at this time.

For example, the court in *United States v. Smith,* 551 F. 2d 348, 358 fn. 20 (D. C. Cir. 1976), indicated that there may be an exception to the general rule of Rule 609(a)(2) and it stated:

> "The potential interaction between Rule 403 and Rule 609(a) elicited comment at legislative hearings on the Proposed Federal Rules of Evidence. Although it offers no solutions, the following colloquy between Congressmen Dennis and Hungate and Judge Friendly is instructive:

Judge Friendly: [D]o you really think if you were on a jury, you would not like to know if the witness had committed a murder. I think I would like to know.

Mr. Dennis: I think I would like to know it, but I think it is very unfair to ask a man who is on trial for some irrelevant or unrelated offense, whether he committed murder or manslaughter 5 years ago. All it does is prejudice the case. It has nothing to do with his credibility in my judgment, especially murder. That is the primary example. Those are usually one time offenses.

Judge Friendly: Perhaps in taking murder I chose an unfortunate case. But, of course, there is the overriding rule that *the judge can always exclude testimony where probative value he thinks is outweighed by its prejudicial effect* and perhaps in the case we are discussing he should do that.

Mr. Hungate: Would that be true with or without the rules?

Judge Friendly: That is true today.

Mr. Hungate: Would it remain true if these rules became effective?

Judge Friendly: I assume they have such a rule in here. I could easily check.

Mr. Dennis: It seems to me if he has to follow this rule [i.e., Rule 609(a)] he does not have much discretion. *Maybe he still* could rule something out. I am not sure.

Mr. Hungate: I apologize for interrupting. Go ahead.

Mr. [sic] Frinedly: I want to check whether there was such a general rule. I thought there was.

Mr. Hungate: *I believe section 403 is the rule to which you are referring* [Quotes the rule.]

Judge Friendly: I think the Congressman's point is a good one. You have the problem: Does that apply when there is a specific rule on the subject? This just says relevant evidence may be excluded if it has this effect. But then somebody is going to argue, this other rule dealt very specifically with the questions and rule 403 is out. *I don't know what the answer would be.* (Citations omitted)." (Emphasis added).

While that court did not express an opinion on this issue, it did raise the question that Rule 403 is applicable, particularly in view of the undue prejudice in this case.

However, in *United States v. Jackson*, 405 F. Supp. 938 (E. D. N. Y. 1975), the court considered the defendant's prior convictions under Rule 609(a). However, the defendant also sought an advance ruling that evidence that he used a *false* name on being arrested was inadmissible under Rule 403 of the Federal Rules of Evidence because its probative value was outweighed by possible prejudice. The court held this evidence *inadmissible* under Rule 403.

Also, in *United States v. Dixon*, 547 F. 2d 1079 (9th Cir. 1976), after citing Rule 609(a), the court indicated in footnote 4, page 1083 that:

> "We do note, however, that under Rule 403 the trial court may exclude evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of

time, or needless presentation of cumulative evidence'. Fed. R. Evid. 403. It is conceivable that in some cases, Rule 403 might afford the trial court discretion to exclude evidence of a prior conviction *even where* the defendant might not be the party prejudiced." (Emphasis added).

Furthermore, in *United States v. Hayes,* 553 F. 2d 824 (2d Cir. 1977) the court reiterated the rule that evidence of a conviction of a crime involving "dishonesty or false statement" *must* be admitted with the trial court having no discretion. However, it further noted at page 827, footnote 4:

> "It is *an open question whether the trial judge retains residual discretion under Fed. R. Evid. 403* to exclude a conviction on grounds of confusion, waste of time or extreme prejudice. *United States v. Smith,* 551 F. 2d 348 (D. C. Cir. 1976)." (Emphasis added).

Thus, since this question has serious implications in criminal cases as in the one at bar, it is respectfully requested that this Court reach this issue at this time.

II. The Trial Court Erred in Allowing the Tape Recording to Go Out With the Jury During Its Deliberations.

During the direct testimony of Internal Revenue Officer Small, the Government played for the jury and the trial court the tape recording of Internal Revenue Officer Small's conversation with Petitioner which occurred on November 16, 1977. A transcript was made of this recording (12a-29a). (N. T. 260-62). At the conclusion of the 45-minute conversation Petitioner handed Small $200 (plus a handful of cigars) which was the basis of this conviction. Both counsel and the trial court agreed the

tape recording was audible and understandable. The tape recording was stopped periodically during his direct testimony and Revenue Officer Small testified as to his comments and offered explanations of the relevant portions of the tape. Unfortunately, Petitioner did not have the same opportunity.

Since the conversation was highly ambiguous concerning the reason for the payment of the $200, the defense to Count III was that Petitioner did not give Revenue Officer Small the $200 to influence his official action. Consequently, it was imperative that Petitioner offer his explanation and comments to the conversation since he was the only person who could rebut Revenue Officer Small's explanation of the conversation which was taped. Defense counsel repeatedly requested the trial court to hold the tape in question inadmissible since it was inaudible and more importantly, since it was highly prejudicial (N. T. 389, 601, 610). The trial court, after closing arguments, held the jury would be allowed to play it for their unbridled use in the jury room if they so requested it (N. T. 601). The jury sent a note to the trial court indicating they wanted the tape recording and the trial court stated ". . . it seems to me that if they wished to play it *over and over* in order to ascertain what was said or what they hear, that there is nothing improper about that . . ." (Emphasis added). (N. T. 611). The trial court gave no further limiting instructions regarding the use of the tape (N. T. 618-620) while even the Government conceded that proper instructions should be given regarding this (N. T. 611). The jury was then given the tape for its unfettered use in the jury room.

Petitioner submitted that the jury, in its unfettered use of the tape during its deliberations, could not help placing undue emphasis on the only taped conversation

between Revenue Officer Small and Petitioner, particularly in light of the fact that there were numerous tapes played at trial. Clearly, this tape highlighted Small's testimony and singled this out to the extreme prejudice of Petitioner. The Petitioner argued that the tape recording should be treated as testimony and not merely as an exhibit and that even if the Third Circuit Court determined the jury should have been permitted to hear the tape again, it should have held that it was impermissible to send it out with the jury for their unfettered use during their deliberations but rather, it should have been conducted in an open courtroom with counsel and the trial court present.

CONCLUSION.

For these reasons, a Writ of Certiorari should be issued to review the Judgment and Opinion of the Third Circuit.

Respectfully submitted,

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April 2, 1979

Appendix.

JUDGMENT AND PROBATION/COMMITMENT ORDER.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET NO. 77-512

UNITED STATES OF AMERICA,

v.

PHILLIP MILESTONE,

Defendant.

In the presence of the attorney for the Government, the defendant appeared in person with counsel Ronald F. Kidd, Esquire on this date May 30, 1978.

There being a verdict of guilty to Count III.

Defendant has been convicted as charged of the offense(s) of Bribery of a public official, Aiding and abetting, in violation of Title 18 United States Code, Section 201(b)(1) and 2.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as

charged and convicted and ordered that: The defendant is hereby commited to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years and a fine in the sum of $10,000 payable to the United States. In addition the defendant is disqualified from holding any office of honor, trust or profit under the United States.

The defendant is directed to surrender for execution of sentence on or before 12 o'clock noon on June 14, 1978 provided, however, if in the meantime arrangements are made by defense counsel and the government as to the place of incarceration, then the defendant can report directly to the institution.

The court orders commitment to the custody of the Attorney General and recommends, U. S. M. C. F. P. at Springfield, Mo. F. C. I. at Lexington, Ky.

It is ordered that the clerk deliver a certified copy of this Judgment and Commitment to the U. S. Marshal or other qualified officer.

/s/ DONALD W. VANARTSDALEN
U. S. District Judge

Dated: May 31, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1826

UNITED STATES OF AMERICA,
Appellee,

v.

MILESTONE, PHILLIP,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D. C. Crim. No. 77-00512-02

Submitted Under Third Circuit Rule 12(6)
on January 12, 1979

Before HUNTER, GARTH, *Circuit Judges,* and BROTMAN,*
District Judge

JUDGMENT ORDER.

After consideration of all contentions raised by appellant, to wit, that the court erred:

1. in ruling that appellant's prior conviction in 1971 for tax evasion would be admissible in the case before it for bribery of an internal revenue officer;

2. in allowing the tape recording between Internal Revenue Officer Small and Mr. Milestone to go into the jury room during its deliberations;

---

* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

3. in admitting into evidence the tape and the prior conviction of appellant because, coupled together, they were highly prejudicial requiring a new trial;

It is ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

JAMES HUNTER, III,
/s/ James Hunter, III,
Circuit Judge

Attest:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: January 25, 1979

Certified as a true copy and issued in lieu of a formal mandate on March 13, 1979.

Test: Thomas F. Quinn

Clerk, United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1826

UNITED STATES OF AMERICA

v.

MILESTONE, PHILLIP

ORDER SUR PETITION FOR REHEARING.

Present: HUNTER, GARTH, *Circuit Judges,* and BROTMAN, *District Judge*

The petition for rehearing filed by Milestone, Phillip, Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By THE COURT,

JAMES HUNTER, III,
/s/ James Hunter, III,
Circuit Judge

Dated: March 2, 1979

No. 78-1499

In the Supreme Court of the United States

OCTOBER TERM, 1978

PHILLIP MILESTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

PHILIP B. HEYMANN
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1499

PHILLIP MILESTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A3-A4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1979. A petition for rehearing was denied on March 2, 1979. The petition for a writ of certiorari was filed on March 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly ruled that, if petitioner took the stand, evidence of his prior conviction for tax evasion could be used to impeach his credibility.

2. Whether it was error to allow the jury to replay a tape recording in the jury room during its deliberations.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of bribing a federal official, in violation of 18 U.S.C. 201(b)(1) and 2.[1] He was sentenced to two years' imprisonment, fined $10,000, and disqualified from holding federal office. The court of appeals affirmed (Pet. App. A3-A4).

The evidence at trial showed that in 1975 petitioner had agreed to make monthly payments of $3,000 to the Internal Revenue Service in order to pay approximately $32,000 in taxes that he owed for 1971 and 1972 (Tr. 172-174).[2] In the spring of 1977, when petitioner was in arrears on his payments, Arnold Small, an officer with the Collection Division of the IRS, was assigned the delinquent tax account (Tr. 169-172). During this period, Internal Revenue

[1] Petitioner was acquitted on two other counts of bribery and one count of conspiracy. Co-defendant Henry Lipschutz, who pleaded guilty to bribery and conspiracy charges, testified on petitioner's behalf at trial.

[2] "Tr." refers to the transcript of the trial; "App." refers to petitioner's appendix in the court of appeals.

Agent Robert Mastrogiovanni was conducting an audit of petitioner's tax returns for 1974 and 1975 (Tr. 56-57). On November 16, 1977, petitioner gave Small $200 in exchange for reduction of the monthly payments on the delinquent account, as well as for Small's efforts on petitioner's behalf in seeking a satisfactory resolution of the tax audit (Tr. 245-246, 254-268; App. 12a-28a).

ARGUMENT

1. Petitioner contends (Pet. 4-10) that the district court erred in ruling that, if petitioner testified, his 1971 conviction for tax evasion could be used to impeach his credibility.

He argues that his tax evasion conviction was not admissible under Fed. R. Evid. 609(a)(2) because tax evasion is not a crime "involv[ing] dishonesty or false statement" (Pet. 6),[3] and that the conviction could not be admitted under Fed. R. Evid. 609(a)(1) because the probative value of admitting this evidence did not outweigh its prejudicial effect (Pet. 5). He

[3] Fed. R. Evid. 609(a) provides:

> **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

also contends that, even if the conviction was admissible under Rule 609(a)(2) as a crime involving dishonesty or false statement, the court should have excluded it under Fed. R. Evid. 403,[4] which, petitioner contends, provides residual authority to exclude unnecessarily prejudicial evidence (Pet. 6-10).[5]

But the evidence clearly was admissible under Rule 609(a)(2) as a crime involving dishonesty or false statement. As the Conference committee made clear:

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretence, *or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.*

H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9 (1974) (emphasis added). And, as the Second Circuit has observed, "a crime which involves defrauding the revenue stands high in the category of crimes in-

[4] Fed. R. Evid. 403 provides in relevant part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice * * *.

[5] Petitioner claims prejudice (Pet. 5) because the crimes of tax evasion and bribery of a tax official both arose out of petitioner's continuing financial difficulties, and the conviction in one makes the charge in the other more plausible. He also complains that, because of the ruling, he did not testify, and as a result his version of the bribery meeting was not presented.

volving veracity." *United States* v. *Apuzzo*, 555 F.2d 306, 307-308 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978) (possession and transportation of untaxed cigarettes). See also *United States* v. *DeAngelis*, 490 F.2d 1004, 1009 (2d Cir.), cert. denied, 416 U.S. 956 (1974) (same offense); 3 *Weinstein's Evidence* ¶ 609 [03a], at 609-74 & n.6 (1978).

The evidence of petitioner's conviction was also independently admissible under Rule 609(a)(1), since the probative value of the evidence clearly outweighed the prejudice to petitioner. As the trial court noted (Tr. 21), a person who would make false statements to the government and attempt to defraud the revenue might also lie under oath. And even though tax evasion and bribery are in some respects similar, this is not sufficient reason, as petitioner contends, to preclude evidence of the tax evasion offense. See, *e.g.*, *United States* v. *Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977). Indeed evidence of similar crimes is not considered overwhelmingly prejudicial in other contexts under the Federal Rules of Evidence, but can be admitted under Rule 404(b) to prove, for example, motive, opportunity, and intent, even when it cannot be used to prove character.

Finally, contrary to petitioner's contention, the trial court's ruling did not prejudice him by precluding him from challenging the government's version of the meeting at which he offered the bribe. To the contrary, a good quality tape recording of the conversation was introduced in evidence and the agent to

whom petitioner offered the bribe was available for cross-examination.

Petitioner contends, however, that this case raises the unsettled question [6] whether crimes involving dishonesty must be admitted under Rule 609(a)(2) regardless of their prejudicial effect, or whether the trial court retains authority under Rule 403 to evaluate the prejudicial impact of the evidence. While the legislative history of Rule 609 suggests that the question is easily answered,[7] it is not necessary to address it in this case. Since the trial court was uncertain whether it should evaluate the prejudicial impact of convictions involving dishonesty, the court conducted such a review in this case (see Tr. 516-

[6] See, *e.g.*, *United States* v. *Hayes*, 553 F.2d 824, 827 n.4 (2d Cir.), cert. denied, 434 U.S. 867 (1977); *United States* v. *Smith*, 551 F.2d 348, 358-359 n.20 (D.C. Cir. 1976)).

[7] The conference report on Rule 609(a)(2) leaves little doubt that the draftsmen's failure to mention evaluation of prejudice in Rule 609(a)(2), coupled with the express requirement to conduct such a review contained in Rule 609(a)(1), was intended to preclude consideration of prejudice where evidence of *crimen falsi* is at issue:

> The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

H.R. Conf. Rep. No. 93-1597, *supra*, at 9.

517).[8] Therefore, petitioner has already received the consideration for which he is contending in this Court.

2. At trial, the government introduced into evidence a tape recording of the November 16, 1977, meeting between petitioner and Small.[9] During its deliberations, the jury asked to hear the recording again in the jury room because it believed the acoustics in "closer quarters" might be better than in the courtroom (Tr. 608). Petitioner objected and requested that the tape be replayed instead in open court (Tr. 610). Although the court agreed with petitioner that the transcript of the recording should not go to the jury, it granted the jury's request to replay the tape in the jury room (Tr. 612-613). Petitioner contends (Pet. 10-12) that the recording should have been replayed, if at all, only in open court and only a limited number of times.

It is within the trial court's discretion to decide whether evidentiary exhibits, including tape recordings, should accompany the jury to the jury room or whether the recordings should instead be replayed in open court. *United States* v. *Zepeda-Santana*, 569 F.2d 1386, 1391 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Alfonso*, 552 F.2d 605, 618-619 (5th Cir.), cert. denied, 434 U.S. 857 (1977);

[8] It is clear that the trial court did not refuse to consider prejudice to petitioner, since it expressly stated, after ruling, that it remained willing to reconsider the issue of prejudice as the trial progressed (*ibid.*).

[9] The conversation had been electronically monitored and recorded with Small's consent (Tr. 254).

United States v. *Stone*, 472 F.2d 909, 914 (5th Cir. 1973). Petitioner makes no showing that the court abused that discretion here. The tape, petitioner concedes (Pet. 10-11), was not confusing, but "audible and understandable," and it was sent to the jury in its entirety so that no particular portion received undue emphasis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
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PHILIP B. HEYMANN
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MAY 1979

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